United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1942

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FOR THE SECOND CIRCUIT

No. 74-1942

MARTINO LIEGGI,

Plaintiff-Appellant,

—against—

REEDER-UNION AG,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Issue

Did Judge Gurfein abuse his discretion* by dismissing the action for failure to prosecute and laches?

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* " 'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Carroll* v. *American Fed. of Musicians,* 295 F. 2d 484, 488 (2 Cir. 1961).

Statement

On September 9, 1970 (1a) plaintiff longshoreman commenced this action against defendant shipowner for alleged January 9, 1968 injury (6a). The day the complaint was filed, the Clerk attempted service on defendant by registered mail addressed to Kiel, Germany (10a). That mail was returned undelivered (1a) because defendant had "in effect" * merged with a company in Hamburg and no longer had any office in Kiel (23a).

Plaintiff made no further effort to perfect service or notify defendant of the action until July 1973, 5½ years after the alleged accident and 2-5/6 years after commencement of the action, when plaintiff caused the Clerk to again attempt registered mail service on defendant in Kiel (14a). That mail was forwarded to Hamburg, where it was received on July 16, 1973 (15a, 16a, 21a). This was the first time anyone on defendant's behalf learned of plaintiff's claimed accident (24a, 25a, 27a).

Defendant answered, affirmatively pleading failure to prosecute and laches (18a), and then moved under F.R. Civ.P. 41(b), 56(b) to dismiss the action on those grounds (19a). Magistrate Raby recommended that the Rule 41(b) motion be granted (43a) and, after reviewing the entire record, Judge Gurfein agreed and dismissed the action (46a).

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* The modifier was used because of uncertainty whether the amalgamation was legally the same as a merger under U.S. law, although "in effect" it was the same.

Argument

Relying on *Hill* v. *W. Bruns & Co.*, 498 F. 2d 565 (2 Cir. 1974), reh. den. —— F. 2d —— (1974), which dealt solely with a Rule 56(b) motion to dismiss for laches, holding that "the ultimate question is one of prejudice in fact, governed by the time of notification of the existence of the cause of action to the defendant and the plaintiff's prompt prosecution of same", 498 F. 2d, p. 569, plaintiff argues that Judge Gurfein erred because defendant did not prove it was prejudice by plaintiff's delay. *Hill* can be distinguished because of "the additional factor", which Magistrate Raby mentioned (42a), that by the time defendant learned of plaintiff's alleged accident 5½ years after its occurrence (vs. 3 years 135 days in *Hill*, 498 F. 2d, p. 569), defendant no longer owned the ship (23a).

> "Negligence in the prosecution of a suit after its commencement should bar relief. Merely instituting a suit does not of itself relieve a person from the operation of the rule of laches; if he fails to prosecute his suit diligently, it is the same as though no suit had been begun." *D. O. Haynes & Co.* v. *Druggists' Circular*, 32 F. 2d 215, 217 (2 Cir. 1929)

Hill did not involve and does not pertain to a Rule 41(b) motion to dismiss for failure to prosecute, which Judge Gurfein granted (46a).

> "Under Rule 41(b), a motion to dismiss may be granted for lack of reasonable diligence in prosecuting. [citations omitted] The operative condition of the Rule is lack of due diligence on the part of the plaintiff—not a showing by defendant that it will be prejudiced by

> denial of its motion. * * * [although prejudice] may be considered by the court, especially in cases of moderate or excusable neglect, in the formulation of its discretionary ruling." *Messenger* v. *United States,* 231 F. 2d 328, 331 (2 Cir. 1956)

Messenger was a Tort Claims Act suit where plaintiff timely served the U.S. attorney but not the Attorney General. In *Richardson* v. *United White Shipping Co.,* 38 F.R.D. 494 (N.D. Cal. 1965), a maritime tort action was commenced shortly before expiration of the analogous statute of limitations, but process was not served until 2⅓ years later because of counsel's neglect. Defendant shipowner had no notice of the alleged accident prior to service, by which time the ship had been sold. Denying plaintiff's motion to vacate an order of dismissal for lack of prosecution, Judge Sweigert wrote:

> "Under these circumstances prejudice to the defendants is obvious. The essential question, however, is whether there has been a failure to prosecute the action with reasonable diligence. * * * Failure to use reasonable diligence in serving a summons is more fraught with possibilities of unfairness and abuse than failure to diligently prosecute an action after summons is served. For, in the latter case, a defendant has at least a timely opportunity to investigate the claim and prepare its defense." 38 F.R.D., pp. 495-496

Citing *Schwarz* v. *United States,* 384 F. 2d 833 (2 Cir. 1967), plaintiff urges that Judge Gurfein should have taxed his counsel instead of dismissing his suit. But *Schwarz* is authority for the rule that: "A dismissal with prejudice for failure to prosecute will not be reversed except for

abuse of discretion.", 384 F. 2d, p. 835; "the client's remedy is a suit for malpractice", 384 F. 2d, p. 836. The law applicable to this appeal is aptly stated in 5 Moore's Federal Practice (2 ed.) § 41.11 [2]:

> "Rule 41(b) clearly places dismissal for failure to prosecute in the district court's discretion." *ib.*, p. 1115
>
> "Failure to make service of process within a reasonable time* may amount to want of prosecution." *ib.*, p. 1124
>
> "Since the order of dismissal for failure to prosecute is discretionary, it will not be disturbed on appeal unless there has been an abuse of discretion." *ib.*, p. 1125; *accord, Redac. Project 6426, Inc.* v. *Allstate Ins. Co.*, 412 F. 2d 1043, 1046 (2 Cir. 1969); *Theilmann* v. *Rutland Hospital, Inc.*, 455 F. 2d 853, 855 (2 Cir. 1972).

Conclusion

The appealed order should be affirmed.

Respectfully submitted,

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* The Southern District of New York once had an abatement rule if process had not been served 3 months after issuance of the summons. *Truncale* v. *Universal Pictures Co.*, 82 F. Supp. 576, 577 (S.D.N.Y. 1949).

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